STATE OF VERMONT

HUMAN SERVICES BOARD

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| In re | ) | Fair Hearing No. 20,889 |
| | ) | |
| Appeal of | ) | |

## INTRODUCTION

The petitioner appeals the decision by Department for Children and Families substantiating a report of sexual abuse by the petitioner under 33 V.S.A. § 4912 involving his stepdaughter, and he seeks to have that report expunged from the Department's child abuse registry. A hearing in the matter has not yet been held. The Department has filed a Motion in Limine to admit hearsay evidence in the form of transcripts of prior trial testimony by the alleged victim.

## DISCUSSION

The petitioner has made an application for an order to expunge a substantiation of sexual abuse of a child placed by the Department in its registry. This application is governed by 33 V.S.A. § 4916 (since amended), which provides in pertinent part as follows:

> (h) A person may, at any time, apply to the human service board for an order expunging from the registry a record concerning him or her on the grounds that it is unsubstantiated or not otherwise expunged in accordance with this section. The board shall hold a fair hearing under section 3091 of Title 3 on the application at

> which hearing the burden shall be on the commissioner to establish that the record shall not be expunged.

Under the statute's definitions, a report is substantiated when "the commissioner or the commissioner's designee has determined after investigation that a report is based upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected." 33 V.S.A. § 4912(10).

In this case the Department seeks to meet its burden of proof solely through the admission of hearsay statements from three sources. The first two are transcripts of testimony by the alleged victim in two separate criminal trials in Orange District Court in September 2005 and July 2006 involving the same allegations against the petitioner. The third is a transcript of the testimony of the alleged victim in a custody hearing held in 2004 in Orange Family Court. It appears that both criminal trials resulted in hung juries. In the family court matter, the Department has not offered any findings or rulings by the court, and the outcome, if any, of those proceedings is unknown.

According to the Department, the alleged victim was 16 in 2004 when she alleged that the petitioner had sexually abused her several times since she was age eleven. The

alleged victim is now nineteen. The Department has indicated merely that "she does not wish to testify in these administrative proceedings". The Department has made no claim or showing that the witness is beyond the reach of a subpoena or is otherwise "unavailable" to testify in the matter. The Department does not allege that the witness suffers from any ongoing physical, mental or emotional disorder that renders her unfit to testify.

For the reasons set forth below, it is concluded that the court transcripts are inadmissible as hearsay under VRE 802, the holding of the Vermont Supreme Court in *In re C.M.*, 168 Vt. 389 (1998), and according to longstanding Human Services Board Rules and procedures. (Much of the ensuing discussion is taken from the recent ruling by the Board (November 2, 2007) in Fair Hearing No. 20,690, as well as past rulings, including Fair Hearing Nos. 16,391 and 17,638.)

As a starting point, the Board is required by its own administrative rules to follow the "rules of evidence applied in civil cases by the courts of the State of Vermont". Fair Hearing Rule 12. Those rules generally forbid the use of "hearsay" testimony to try to prove an allegation. "Hearsay" is defined in the Vermont Rules of Evidence as "a statement, other than one made by the declarant while testifying at the

trial or hearing, offered in evidence to prove the truth of the matter asserted". V.R.E. 801. In the context of abuse and neglect hearings, "hearsay" evidence most often takes the form of taped statements of alleged victims and the testimony and notes of therapists and investigators offered to prove the fact of the alleged abuse. As was the case in Fair Hearing No. 20,690, it can also include transcripts of the testimony of the alleged victim in prior court proceedings. However, all such evidence is considered inadmissible hearsay under state evidentiary rules unless it is admissible under some specified exception to the hearsay rule. See V.R.E. 802.

The Board has long recognized that the Department has an obligation to protect children, and because children are frequently newly traumatized by repeating their allegations in a formal setting, the Department can be confronted with a dilemma when it tries to prove the facts it relied upon in entering findings that would lead it to place a perpetrator's name in its registry. It is often the case that there are no other witnesses to the abuse, nor inconclusive physical evidence of the abuse, and no admissions of the abuse by the alleged perpetrator. The crucial, and in many cases the only, evidence is the statement of the victim; and under the

formal rules of evidence, the only way those statements can be taken into evidence (unless they are subject to an enumerated exception, see *infra*) is through the direct testimony of the alleged victim.

For many years the Board, in cases of child witnesses, responded to this dilemma by invoking a special exception to the "hearsay rule" found in its own administrative rules. The so-called "relaxed hearsay rule" allows substitutions for the direct testimony of the alleged victim when the hearing officer determines that following the formal rules would create an "unnecessary hardship and the evidence offered is of a kind commonly relied upon by reasonably prudent persons in the conduct of their affairs". Fair Hearing Rule 12. Under this relaxed rule, which was applied for over a decade, the Board typically found that it was a "hardship" for the Department to produce an alleged child victim, and it admitted some other evidence in lieu of the child's testimony --most commonly tape-recorded statements and therapist and investigator notes and testimony. To be sure, this hearsay testimony, even though deemed admissible, was subjected to rigorous scrutiny for trustworthiness and was often ultimately rejected by the hearing officer. However, the Board considered this a fair relaxation of the rule not only

because of this strict scrutiny of the hearsay, but also because the Department's burden of proof was not high compared to a criminal proceeding (a "preponderance of the evidence" rather than "beyond a reasonable doubt") and, more importantly, because the loss of property or liberty to the petitioner by being listed in the registry was considered minimal compared to criminal penalties.

In the early 1990s, a challenge was made to this process through an appeal to the Supreme Court by a petitioner who was found to have sexually abused two children based only on hearsay evidence. Fair Hearing No. 11,766. In its decision the Supreme Court affirmed that the Board could correctly support a decision that sexual abuse occurred solely through the use of hearsay evidence. In re Selivonik 164 Vt. 383, 390 (1995).

For a few years thereafter the Board continued to use this standard, believing that the Vermont Supreme Court had approved it. However, in 1996, the Board, in a rare rejection of the hearing officer's finding that the hearsay evidence offered in the case was unreliable, made a finding of sexual abuse against a father of his child based solely upon hearsay evidence. That decision was appealed to the Supreme Court. See Fair Hearing No. 13,720. The Supreme

Court reinstated the hearing officer's finding that the hearsay testimony had been unreliable on the issue of whether the child had been telling the truth and reversed the Board's denial of the expungement. In re C.M. 168 Vt. 389 (1998). However, the Court went further to decide an important issue raised by the appellant, which was the use of the "relaxed hearsay" rule in proceedings involving sexual abuse allegations of children. The appellant in that case argued that the Board should be subject to the restrictions in Rule 804a, an evidentiary exception in the Vermont Rules of Evidence, even though the Board was not specifically enumerated as an administrative agency covered by the rule. The Department (then S.R.S.) argued that the Board should be allowed to continue to use its Rule 12 in these cases. However, the Court agreed with the petitioner that the legislature intended to include all administrative agencies in V.R.E. 804a. It "found no reason to exclude expungement proceedings from this general rule" and concluded that V.R.E. 804a applied in determining the admissibility of hearsay statements concerning abuse in an expungement hearing.

V.R.E. 804a is quite different from Fair Hearing Rule 12 in that it requires that a child under age 10 or a mentally

impaired adult be made available at the hearing before the hearsay statements are allowed in:

> RULE 804a. HEARSAY EXCEPTION; PUTATIVE VICTIM AGE TEN OR UNDER; MENTALLY RETARDED OR MENTALLY ILL ADULT
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> (a) Statements by a person who is a child ten years of age or under or a mentally retarded or mentally ill adult as defined in 14 V.S.A. Sec. 3061 at the time of trial are not excluded by the hearsay rule if the court specifically finds at the time they are offered that:
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> (1) the statements are offered in a civil, criminal or administrative proceeding in which the child or mentally retarded or mentally ill adult is a putative victim of sexual assault. . .[1]
>
> (2) the statements were not taken in preparation for a legal proceeding . . .
>
> (3) the child or mentally retarded or mentally ill adult is available to testify in court or under Rule 807[2]
>
> (4) the time, content and circumstances of the statements provide substantial indicia of trustworthiness.

Since the Supreme Court's ruling in C.M., the Board has strictly applied the Vermont Rules of Evidence in *all* child and vulnerable adult abuse cases, ruling that the Department cannot present hearsay evidence without making the child or vulnerable adult available to testify. See Fair Hearings

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[1] There follows a long list of enumerated proceedings to which this section applies. As the Supreme Court has already determined that this section applies to sexual abuse expungement proceedings before the Board, it is not necessary to list them.

[2] Rule 807 allows recorded under-oath testimony and testimony via two-way closed circuit television (see infra).

Nos. 16,391, 16,479, 16,838, 18,092, and 19,886. The Board has specifically ruled in these cases that as the proponent of the hearsay statements it is the obligation of the Department to procure the attendance of the child or vulnerable adult witness at the hearing for purposes of cross-examination. If it chooses not to do so, or if the witness is otherwise unavailable to testify, any hearsay evidence is disallowed to prove the truth of the allegations.

In its recent ruling in Fair Hearing No. 20,690, the Board rejected the Department's argument that the Court's holding in *C.M.* is inapplicable to a case in which the child is over ten and only physical abuse, not sexual abuse, is alleged. Following the reasons set forth in 20,690 it must be concluded that it would be even more inconsistent not to apply the ruling in *C.M.* to a case in which sexual abuse *is* alleged, and where the witness is now an adult.

However, in Fair Hearing No. 20,690, the Board also held that *C.M.* does *not* apply in cases where the proffered hearsay evidence falls under another exception set forth in the Vermont Rules of Evidence. (See also Fair Hearing No. 19,895.) As the Board noted, VRE 804 is a general rule that includes a hearsay exception for "former testimony". However, to qualify as an exception to hearsay under VRE 804

the "declarant" of that testimony (in this case, the petitioner's stepdaughter) must be "unavailable as a witness".

One of the definitions of unavailability under the rule is that the witness "is absent from the hearing and the proponent of his statement (in this case, the Department) has been unable to procure his attendance. . . by process or other reasonable means". VRE 804(a)(5). In Fair Hearing No. 20,690, the Board held that the declarant was "unavailable" because she was a minor living in New Hampshire and that neither she nor her parent had any ties to Vermont that would subject the witness to a subpoena in a Vermont administrative proceeding. See *Boehm v. Willis*, 181 Vt. ___, (2006).

The Department has made no such claim or showing in the instant matter. The witness in this case is now an adult who lives in Vermont. It appears the Department has chosen to respect her decision not to testify voluntarily and decided not to compel her attendance through a subpoena, although it clearly has available the legal recourse to do so. Not only does this distinguish this case from the ruling in Fair Hearing No. 20,690 as to the witness's "availability" under V.R.E. 804, but it also fails to meet the exception to

hearsay (assuming it was legally applicable under *C.M.*) contained in the Board's own Rule 12.

To the hearing officer's knowledge, the Board never applied the "hardship" provision of Rule 12 to a competent adult witness who refuses to voluntarily appear at a hearing. See Fair Hearing No. 19,139. As noted above, the Department has made no showing that the witness in question is under any physical or mental impairment. It appears she has testified against the petitioner on at least three separate occasions within the last two years. Although it is understandable that she may not wish to testify again, the Board's longstanding policy has been to require more in the way of a showing of "hardship" from the Department in order to invoke the provisions of Rule 12.

As was the case in Fair Hearing 20,690, the Department represents that the petitioner's stepdaughter testified against the petitioner at criminal and civil trials involving the same allegations, that the petitioner at those trials had a full and fair opportunity to cross examine her, and that such testimony has been held to meet constitutional standards of witness confrontation. See *State v. Sprague*, 144 Vt. 385 (1984). Unlike Fair Hearing No. 20,690, however, the witness in this case is clearly "available" to testify, and unlike

the Board's policy prior to *C.M.* the Department has made no showing of "hardship" necessary to invoke Rule 12.

The Department concedes that it has no other evidence in this matter, and that if the court transcripts are deemed inadmissible, the petitioner is entitled to the expungement of the reports of sexual abuse in question.

## ORDER

The Department's decision substantiating the reports of sexual abuse is reversed and those reports shall be expunged from the Department's abuse registry.

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